



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Servrite International Limited

File: B-229697

Date: April 5, 1988

DIGEST

1. Contracting officer's affirmative determination of responsibility, which found the contractor had a current ability to perform the contract work, was reasonable where it was based on favorable preaward survey and contractor performance history.
2. A protest that the agency relaxed specifications or otherwise made concessions for the sole benefit of one offeror is denied where the evidence of record indicates that the agency accepted a proposal which conformed to all material solicitation requirements.
3. Protest concerning awardee's actual compliance with its contract obligations is a matter of contract administration which is not within the General Accounting Office's bid protest function. Other protest allegations that contracting agency induced the protester, as the incumbent contractor, to increase its inventory of raw materials and equipment and that these items were subsequently confiscated by the agency are also matters of contract administration for resolution under the Disputes clause of the contract.

DECISION

Servrite International Limited protests the award of a contract to Contact International under request for proposals (RFP) No. F61546-87-R-0066, issued by the Department of the Air Force, Lindsey Air Station in West Germany. The protester challenges the award to Contact on several grounds, the most relevant of which are: that the contracting officer's affirmative determination of Contact's responsibility was made fraudulently and in bad faith; that the agency's evaluation of Contact's technical proposals was not in accord with stated criteria; or alternatively, that the agency improperly relaxed certain specification requirements or otherwise made concessions to facilitate Contact's ability to perform.

041795

We dismiss the protest in part and deny it in part.

The RFP, issued on March 30, 1987, requested proposals to furnish all services and supplies to produce and deliver milk and dairy products at the government owned, contractor operated dairy plants in Ankara, Turkey; Adana, Turkey and Athens, Greece. The solicitation contemplated the award of a firm, fixed-price contract with economic price adjustments for a base year and four 1-year option periods. Schedule I of the solicitation listed the annual estimated quantities for the base year for all three locations and Schedules II through V listed the annual estimated quantities for the first through four option years, respectively.

The solicitation also provided that award would be made to that responsible offeror whose offer, conforming to the solicitation, is the lowest priced. Further, to be considered for award, the potential contractor was required to meet certain "general standards" of responsibility, including:

"52.215-1599A MINIMUM STANDARDS FOR RESPONSIBLE PROSPECTIVE CONTRACTORS--GENERAL AND ADDITIONAL STANDARDS

a. General Standards: Except as otherwise provided hereinbelow, a prospective contractor must:

.
(2) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental;"

The Air Force received price proposals from Servrite, who was the incumbent contractor, and Contact. Both proposals were found acceptable and the two offerors were asked to submit best and final offers (BAFOs). Contact's proposal was evaluated as \$605,404 less than Servrite's, considering all option periods. Thereafter, the contracting officer, making an affirmative determination of Contact's responsibility, made award to that firm on November 24, 1987. On November 25, Servrite filed this protest. The Air Force has authorized continued performance because of the critical nature of the requirement.

Servrite's allegations of bad faith on the part of the Air Force regarding Contact's responsibility are based on its belief that Contact cannot meet the requirements of the solicitation. According to Servrite, it is virtually

impossible for any company, such as Contact, "which does not have a presence anywhere in the vicinity of Greece or Turkey" to provide the necessary materials and equipment, by itself, within the 8 days of contract award and the performance start date. According to the protester, a "long setup period"--certainly more than 8 days--is necessary to procure, transport and ship overseas the supplies and equipment to all three plant locations.

In addition, Servrite cites a series of events on the part of the Air Force which allegedly contributed to a substantial delay in awarding the contract. This is significant, according to Servrite, because the "character" of the procurement changed between June/July 1987, as of when the agency allegedly originally intended to make an award, and November 1987. Servrite argues that the delay in awarding a contract adversely impacted on a prospective contractor's ability to meet the production and delivery schedules of the RFP. Moreover, this adverse impact became critical where, as here, the offeror being considered for award did not have any "similar facilities in Europe, the near East, or the United States." Thus, the protester asserts that the contracting officer was required to have a second preaward survey done on Contact so that his determination of responsibility would be based on the most current information available at the time of award. Since the contracting officer's responsibility determination was based on information obtained in June/July, Servrite argues that, if an affirmative determination was made, that determination was fraudulent.

Another basis for its challenge to the contract award is Servrite's assertion that the contracting officer failed to consider the requirements of paragraph 52.215-1599A, quoted above, in evaluating Contact's technical proposals. Alternatively, the protester contends that if the contracting officer did consider this evaluation factor, he must have made the award "despite a finding that the awardee could not meet this evaluation factor."

The protester further alleges that if Contact was able to meet the requirements of the RFP and commence performance within 8 days of award, it could only have done so if the Air Force had improperly relaxed the delivery schedule requirements or made other concessions to enable the firm to perform. Servrite argues that either action by the agency would constitute a violation of applicable procurement regulations since this was done solely for Contact without permitting other offerors to compete on the same basis.

Our Office does not generally review protests against affirmative determinations of responsibility unless there is

a showing of possible fraud or bad faith on the part of the procuring officials or a possible failure to apply definitive responsibility criteria contained in the solicitation. 4 C.F.R. § 21.3(f)(5)(1987); see also Swedlow, Inc., B-225534, B-225535, Mar. 30, 1987, 87-1 CPD ¶ 359 at 4. Contracting officials are presumed to act in good faith and in order to show that a responsibility determination was made fraudulently or in bad faith, the protester must demonstrate by virtually irrefutable proof that the contracting officials had a specific and malicious intent to injure the protester. See Stephan Wood Products, Inc., B-225631, Apr. 1, 1987, 87-1 CPD ¶ 369. We do not believe the protester has made this showing.

The record indicates that the contracting officer's affirmative responsibility determination was based primarily upon a preaward survey conducted in June 1987 by the Defense Contract Administration Services office in Chicago, where Contact's home office is located, recommending award to Contact, and input from another military installation in Korea where Contact is presently performing a similar contract. The record clearly reflects that the preaward survey team considered the various factors related to the matter of Contact's responsibility, including its production capabilities, and found all to be satisfactory.

As noted above, Servrite claims that no other firm could meet contract delivery requirements because the very short period between award and commencement of performance caused by the delay in award would not permit another contractor to set up, and that a follow-up preaward survey would have shown that Contact was not responsible in this regard. However, the contracting officer states that he determined that Contact had the current ability to produce dairy products in Greece and Turkey. Contact states that it did not need a long set-up time, as alleged by Servrite, because of its supplier arrangements. While Servrite disagrees, we cannot find on this record that Servrite clearly did not have the requisite capability to perform this contract, particularly in view of the comments of the preaward survey team concerning Servrite's abilities. Further, since no adverse information indicating that Contact could not meet contract requirements surfaced in the period from the date the preaward survey was completed to the award date, there was no need for the contracting officer to obtain another preaward survey--which would have just further delayed the award.

In short, we see no basis for concluding that the Air Force unreasonably found that Contact could meet contract requirements, much less that Servrite has shown by irrefutable

proof that the Air Force had a specific and malicious intent to injure the protester in making award to Contact.

Furthermore, the "general standards" provision of paragraph 52.215-1599A, cited above, cannot be construed as definitive responsibility criteria as contended by Servrite. Definitive responsibility criteria are specific and objective standards, such as a requirement to have certain specific level of experience, set forth in the solicitation which must be met as a prerequisite to award. These standards are established by the contracting agency to determine a firm's ability to perform, and are in addition to general standards of responsibility. See Best Pest Control Co., B-228101.4, Oct. 7, 1987, 87-2 CPD ¶ 342. Here, the provision in section 52.215-1599A of the solicitation does not set out specific, objective standards measuring the offerors' ability to perform; instead, the provision expresses in general terms factors which are encompassed in the contracting officer's subjective responsibility determination. Consequently, there was no violation of any definitive responsibility requirements.

Based on the foregoing, Servrite's protest that Contact was not a responsible contractor is denied.

To the extent Servrite's protest against Contact's ability to meet the delivery schedule requirements constitutes a challenge to the agency's evaluation of Contact's proposal, we find no merit in it. No technical proposals were required under the RFP; competition was based on price, and Contact was evaluated as the low offeror. Servrite has provided nothing to establish that the evaluation of Contact's proposal was unreasonable. As to the protester's question about Contact's ability to perform, we view this as a mere attempt to revisit the issue of Contact's responsibility.

With regard to Servrite's allegation that major requirements of the solicitation, including the delivery schedule, were improperly relaxed, the Air Force, in its report on the protest, denies this allegation. The agency also denies providing any special assistance or concessions to any firm, including Contact, under this procurement. The agency also points out that Contact's proposal complied with, and took no exception to, any solicitation requirements.

In extensive comments on the agency report, Servrite maintains its position that the Air Force must have provided special assistance or otherwise made concessions to Contact and that by doing so, the agency effectively relaxed the requirements of the RFP solely for the benefit of Contact and without notice to Servrite. For example, the protester

alleges that on November 3, the agency initiated action to extend its current contract because the contracting officer reportedly "was having difficulty in getting a decision from headquarters on the final contract award." However, on November 23, Servrite alleges that it found out that the contracting officer's actual reason for negotiating an extension of its existing contract was to provide special assistance to Contact, the intended awardee. Also on that date, the protester states that it was asked by the contracting officer to transfer "Servrite-owned" equipment and materials to Contact allegedly to enable that firm to perform.

We find no evidence that the Air Force made concessions or otherwise provided special assistance to Contact that would constitute a relaxation of various requirements of the solicitation, including the delivery schedule. We have reviewed the requirements of the RFP, including the statement of work, and find no merit in Servrite's assertion that the delivery schedule and major provisions of the SOW were improperly relaxed for the sole benefit of Contact. As the agency pointed out, this is a requirements contract under which delivery orders will be issued and each delivery order will therefore establish its own delivery schedule. Moreover, Contact's proposal conforms to all material requirements. Thus, Servrite's allegation of improper relaxation of various solicitation requirements is unsubstantiated.

Servrite also alleges in its comments that, at the urging of the contracting officer, it shipped large quantities of raw materials and supplies to the three plant locations during October and early November, which resulted in "inventory levels grossly in excess of the amounts reasonably required by the Air Force" to meet its needs for the duration of Servrite's contract performance. The protester states that it did so on the mistaken belief that the firm had a reasonable chance of receiving the follow-on contract. The protester alleges, however, that when its contract ended on November 30, the Air Force


"confiscated all of [its] raw materials and supplies, in violation of Servrite's contract and without prior payment, for the apparent sole purpose of enabling this property to be used by Contact."

Servrite's claims that the contracting officer induced the firm to increase its inventory of raw materials and supplies, while knowing that the follow-on contract would be awarded to Contact, and the alleged "confiscation" of these

materials and supplies, are matters of contract administration that should be pursued under its contract disputes clause and the Contract Disputes Act of 1978, 41 U.S.C. § 601-613 (1982), which establishes procedures for resolution of such claims. Such matters are not subject to review by our Office under the bid protest regulations.

Finally, Servrite challenges the Air Force's failure to promptly notify the firm of award to Contact. Servrite contends that it was prejudiced by this failure inasmuch as the award document was executed on October 27 by the contracting officer but Servrite was not informed of the award until November 23. Had it known of the award to Contact, Servrite asserts that it would not have increased its inventory levels during October and November nor participated in negotiations for an extension of its contract. However, as we stated in Space Communications, B-223326.2, B-223326.3, Oct. 2, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ 377 at 5, any impropriety on the agency's part in this matter does not provide a basis to sustain the protest.

Accordingly, the protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel